

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

IN RE SUBPENA)
)
ADDRESSED TO THE) Docket No. HQ12008310019
)
OFFICE OF SPECIAL COUNSEL)
_____)

OPINION AND ORDER

This order addresses the continuing controversy over the production to Betty Martin of the Special Counsel's investigative file compiled pursuant to complaints of prohibited personnel practices the Special Counsel previously received from Ms. Martin. Ms. Martin seeks the file in connection with discovery related to the appeal of her removal by the Department of the Air Force. That appeal is currently pending before the Board's St. Louis Regional Office.

The matter of production of the Special Counsel investigative file is before the Board pursuant to the application of Betty Martin ("the applicant") for enforcement of a subpoena issued and modified by Administrative Law Judge Frank W. Vanderheyden. That subpoena commanded the Special Counsel to make the investigative file available to Ms. Martin for inspection and copying.

On December 14, 1983, the Board, upon review of the application for enforcement, determined that 23 documents within the investigative file were protected from disclosure under the work product privilege. In addition, the Board determined that 111 other documents within the file lacked protection under the

investigative and work product privileges asserted by the Special Counsel and ordered the Special Counsel to make them available to Ms. Martin. In addition, because 43 other documents had been insufficiently described by the Special Counsel, the Board ordered the Special Counsel to produce them to the Board for in camera inspection.^{1/}

Accordingly, the Special Counsel transmitted the 43 documents for review.^{2/} On the basis of that inspection, the Board has determined that six of the 43 documents were prepared

^{1/} The applicant contends that the Board should not engage in in camera inspection of the documents and that such review instead should be performed by the Administrative Law Judge. According to the applicant, in camera review by the Board bears the potential for prematurely influencing the outcome of the appeal in the event it later comes before the Board on petition for review. Applicant's argument is without merit. The Board's action is not unlike that of a United States district court engaging in in camera inspection of documents sought in discovery in a case that later will come before it for full review on the merits. Moreover, the Board's exercise of in camera review lies fully within its subpoena enforcement authority under 5 U.S.C. § 1205(c) and 5 C.F.R. § 1201.85. The Board's prudent invocation of that authority in a United States district court requires that the Board adequately satisfy itself before requesting district court enforcement that a party's contumacy or failure to obey a Board subpoena is unwarranted.

^{2/} The applicant has requested that all documents submitted for in camera inspection, whether or not ordered disclosed to the applicant, be preserved by the Board for purposes of judicial review. The applicant's request is GRANTED to the extent that it reaches to the 43 documents which the Board ordered submitted for inspection and which it has reviewed in camera. The Board shall maintain under seal all documents it herein finds privileged. The Special Counsel inexplicably also submitted twelve documents which the Board had not requested for in camera review. (Documents 67, 68, 71, 72, 73, 74, 78, 79, 80, 81, 82, 120, 121.) Inasmuch as the Board previously ruled upon production of those documents in its Opinion and Order of December 14, 1983, it did not have reason to inspect those documents in camera. Therefore, they are being returned to the Special Counsel.

by or for the Special in an investigation into the appellant's allegations of prohibited personnel practices. As such, they were prepared "in anticipation of litigation," inasmuch as that course of action constitutes the only means available for enforcement by the Special Counsel. See 5 U.S.C. §§ 1206(c)(1)(B), (g), (h), 1207, 1208; Fed. R. Civ. P. 26(b)(3). For this reason and others previously discussed in the Board's order of December 14, 1983, with regard to work product, the following documents, as previously numbered, are protected from disclosure by the Special Counsel under the work product privilege:

94, 123, 124, 126, 176, 177.

In addition, 34 documents submitted for in camera inspection were prepared by Air Force personnel or other individuals not employed by the Special Counsel. The Special Counsel at no time has asserted that documents included within the file that were generated by persons outside the Office of Special Counsel were prepared for him. Therefore, these 34 documents do not constitute work product. Accordingly, the Special Counsel is ORDERED to produce the following 34 documents:

42, 44, 45, 47, 48, 49, 50, 51, 52,
53, 54, 55, 56, 57, 58, 59, 60, 61,
62, 63, 64, 65, 66, 69, 70, 82, 83,
84, 85, 86, 87, 88, 89, 122.

One of the 43 documents was prepared by the applicant. The Special Counsel has stated previously that he has no

objection to providing documents contained within the file that were prepared by the applicant. Response to Order of September 22, 1983, at 5 n.3. Therefore, the Special Counsel is ORDERED to produce the following document prepared by the applicant and therefore not the subject of the claim of work product privilege:

106.

One additional document constitutes correspondence prepared by the Office of Special Counsel and transmitted to the General Accounting Office. Another document similarly constitutes CS' correspondence transmitted to Senator Thomas Eagleton. Both letters concern the status or procedural handling of the case, and do not expressly or impliedly involve mental impressions or theories of personnel in the Office of Special Counsel about the case. Thus they do not appear to constitute attorney work product. Even if they did, the Special Counsel may be considered to have waived the privilege by disclosures of the information contained in the correspondence to the General Accounting Office and Senator Eagleton. See In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981), cert denied, 455 U.S. 1000 (1982).

Therefore, the following documents are ORDERED disclosed:

102, 119.

As a final matter, it has come to the Board's attention that differences exist between the applicant and the Special Counsel over the appropriate arrangements for inspection and

copying of the documents produced by the Special Counsel both under the Board's earlier order of December 14, 1983, and this order. The underlying subpoena as issued and modified by the Administrative Law Judge was silent as to the place and manner in which the records of the Special Counsel were to be made available for inspection and copying. Therefore, some confusion exists between the applicant and the Special Counsel as to where inspection should occur and who should bear the burden of copying.

The applicant contends that the Special Counsel should deliver the documents to the office of her counsel where, upon inspection, counsel should be free to perform whatever copying is necessary. The Special Counsel disagrees, arguing that the appropriate location for inspection of the documents should be the Special Counsel's office where copying, at the applicant's request, will be performed at the cost of twenty-five cents per page.

The Board believes the most appropriate arrangement is one providing for inspection and copying of the documents at the office of the Special Counsel. This course would best promote the administrative efficiency and responsiveness of the Special Counsel in making the necessary documents available to the applicant. It would also most ensure the physical integrity of the documents themselves.

Courts may require the moving party seeking documents during discovery to bear the expense of copying documents subpoenaed by the moving party. The producing party need not bear the cost of making copies for the convenience of the moving party.

J. Moore & T. Currier, Moore's Federal Practice, ¶¶ 34.19[2] and [3] at 34-73, 34-76 (2d ed. 1982); Niagara Duplicator Co. v. Shackelford, 160 F.2d 25 (D.C. Cir. 1947).

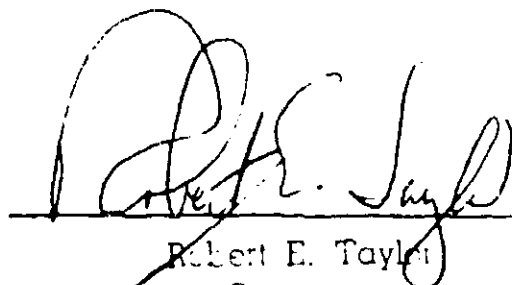
The Special Counsel has indicated that he intends to charge the applicant twenty-five cents per page for the copying it performs. That is the rate applied by the Special Counsel for copying performed under the Freedom of Information Act. 5 C.F.R. § 1260.4(a). Although the present dispute is not per se a FOIA matter, the Board regards the Special Counsel's FOIA copying rate to be an appropriate guide here, inasmuch as the FOIA allows agencies to charge only their direct costs for copying. 5 U.S.C. § 552(a)(4)(A).

Therefore, the Special Counsel is ORDERED within three working days of this order to make available at the Special Counsel's office for inspection and copying by the applicant the original copies of all documents ordered disclosed by this order and the Board's previous order of December 14, 1983. The applicant shall reimburse the Special Counsel for any copying the Special Counsel performs at the rate of twenty-five cents per page.

FOR THE BOARD:

April 4, 1984
Date

Washington, D.C


Robert E. Taylor
Secretary